TESTIMONY OF

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ON THE

STRENGTHS AND WEAKNESSES OF REGULATING GREENHOUSE GAS EMISSIONS USING EXISTING CLEAN AIR ACT AUTHORITIES

HEARING BEFORE THE SUBCOMMITTEE ON ENERGY AND AIR QUALITY U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman and members of the subcommittee, I want to thank you for the gracious invitation to be with you here today, giving me an opportunity to discuss the strengths and weaknesses of regulating greenhouse gases using existing Clean Air Act authorities. My name is Raymond Ludwiszewski. I am a partner with the law firm of Gibson, Dunn & Crutcher LLP, and I served as General Counsel of the Environmental Protection Agency under Administrator William Reilly.

I have a national law practice specializing in environmental matters and have been involved in greenhouse gas litigation for several years. However, I do not appear before the subcommittee representing or advocating the position of any particular client or industry. I am not receiving remuneration from anyone for my testimony today, and the views expressed in my testimony are my own and not necessarily those of any company or group that I currently represent or have represented. I am not here to recommend any particular course of action by this subcommittee or Congress. Rather, I have been asked to offer my views as an experienced practicing attorney on the avenues available to the Environmental Protection Agency to address greenhouse gases under existing Clean Air Act authorities.

There are many sources of authority for regulating greenhouse gases under the current Clean Air Act, but I will focus on the four most prominent – and perhaps – problematic: the Title I provisions on national ambient air quality standards, new source review, and new source performance standards, and the mobile source program under Title II. While these existing authorities under the Clean Air Act are available to EPA as tools for regulating greenhouse gases, they are blunt instruments, plainly designed for the different task of regulating local emissions causing local or regional effects.

Accordingly, existing Clean Air Act authorities are poorly suited to the challenges of regulating this global phenomenon.

If EPA stretches the existing Clean Air Act regime to fit the needs of greenhouse gas regulation, it will enter uncharted legal territory. In my experience, new and creative interpretations of existing statutory authority often are viewed by industry or environmental groups as disrupting long-standing, well-settled expectations concerning the boundaries of agency authority. As such, they invite legal challenge. Moreover, courts are inherently suspicious of new, novel statutory or regulatory interpretations that are not obvious from the face of the law. These prolonged court challenges, in turn, delay protection of the environment and create uncertainty in business planning for the regulated community. Any evaluation of the strengths and weaknesses of using existing Clean Air Act authorities for regulation of greenhouse gases should consider these consequences.

National Ambient Air Quality Standards

The "heart" of the Clean Air Act is the set of provisions governing the creation and attainment of national ambient air quality standards ("NAAQS").[1] These provisions are triggered when the Administrator makes an "endangerment finding" – that is, when the Agency determines that emissions of an air pollutant "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). This key endangerment finding, in turn, initiates the development of air quality criteria, *id.* § 7408(a)(2), and primary and secondary NAAQS, *id.* § 7409(b). The primary NAAQS set a limit on the concentration of the regulated

[1] *Train v. Natural Res. Def. Council*, 421 U.S. 60, 66 (1975).

pollutant in the ambient air at a level adequate to protect the public health (including an adequate margin of safety). *Id.* § 7409(b)(1). The secondary standards protect public welfare and are set at the same or stricter level than the primary standards. *Id.* § 7409(b)(2). These standards, or more stringent standards adopted by the states, are implemented through federally-approved state implementation plans ("SIPs").

Unfortunately, this program is not particularly well-suited to the regulation of greenhouse gases. State and regional compliance with NAAQS requirements is judged from the perspective of pollutant *concentration* in the ambient air. (That is, the units of measure for the standards governing current criteria pollutants are expressed in parts per million by volume, milligrams per cubic meter of air or micrograms per cubic meter of air). For traditional criteria pollutants, concentrations generally vary from place to place as a result of differences in local or regional emissions and prevailing air flow conditions. In contrast, greenhouse gases disperse globally and persist in the atmosphere for many years. These physical characteristics are very different from the physical qualities of the traditional pollutants that the Clean Air Act NAAQS program was designed to combat.

As a result of these fundamental differences, which distinguish greenhouse gases from traditional criteria pollutants, EPA would have great difficulty distinguishing "attainment" from "nonattainment" areas for any greenhouse gas NAAQS. Accordingly, unless the NAAQS standard for greenhouse gases is set at a level above the current atmospheric concentration, the EPA could be required to list all states as nonattainment areas. Under this scenario, a state could never achieve "attainment" status with its own efforts; rather, the ability of states to reach "attainment" would depend on the willingness not only of other states, but also of nations around the globe, to reduce their greenhouse

gas emissions. Alternatively, if EPA set the greenhouse gas NAAQS standard at the current atmospheric concentrations, states essentially would have to offset all new emissions—both from their jurisdiction as well as other jurisdictions like India and China—in their SIPs. .

Thus, to regulate greenhouse gases effectively under this provision, EPA either would need to set the NAAQS standard above current atmospheric levels for greenhouse gases or would need to revise the NAAQS concept, taking the focus away from concentration levels and moving towards emission limitations. As these choices demonstrate, the inability of states to reduce greenhouse gases in their environment by their own efforts creates tension with the fundamental premise of the NAAQS program– that states mainly reach compliance and, by extension, attainment via their own efforts.

New Source Review

The physical characteristics of greenhouse gases also impact another aspect of the NAAQS program – implementation through the New Source Review ("NSR") program. NSR requirements vary based on whether the source is located in an attainment or nonattainment area, but generally require preconstruction review and permitting for "major stationary sources." Sources in attainment areas are subject to the prevention of significant deterioration or PSD permit program. In these areas, "stationary sources," as defined below, are regulated as "major stationary sources" if they have the potential to emit at least 250 tons per year of a regulated pollutant or, if included on EPA's select list of source categories, at least 100 tons per year of a regulated pollutant.
42 U.S.C. § 7479(1)(defining "major emitting facility").

The term "stationary source" is very broad and includes "any building, structure, facility or installation" which emits or may emit a regulated pollutant. *Id.* § 7411(a)(3). Although the 100 tons per year or 250 tons per year trigger generally limits permit requirements to large stationary sources, like electric utilities, chemical plants, and refineries, the statutory threshold is not set high enough to limit "major stationary sources" of the primary greenhouse gas – carbon dioxide. Rather, the application of the definition of major stationary source to greenhouse gases will greatly expand the number of facilities regulated. Office and apartment buildings, hotels, enclosed malls, large retail stores and warehouses, college buildings, and hospitals could become subject to the Clean Air Act permitting process for the first time.[2] The expanded universe of regulated sources would greatly complicate both the state efforts in formulating state implementation plans and the ability of regulators at all levels to enforce those plans.

To combat this explosion of regulated sources, EPA will have limited flexibility. Due to the nature of the requirements—preconstruction review and permitting—the NSR program is source-specific by definition. Accordingly, utilizing cap-and-trade as a tool under this program would be very challenging.

New Source Performance Standards

The New Source Performance Standards ("NSPS") offer another available avenue for regulation of greenhouse gases. Section 111 requires EPA to publish a list of industry categories and to adopt standards of performance reflecting "the degree of emission

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[2] See Massachusetts v. U.S. EPA Part II: Implications of the Supreme Court Decision: Hearing Before the H. Select Comm. on Energy Independence and Global Warming, 110 Cong. (2008) (statement of Stephen L. Johnson, Adm'r, U.S. Envtl. Protect. Agency).

reduction achievable through application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1).

Sources, not pollutants, are the trigger for these provisions. The Administrator must list "categories of stationary sources . . . if in his judgment [those sources cause, or contribute] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," *id.* § 7411(b)(1)(A), and must then publish federal standards of performance for such sources. *Id.* § 7411(b)(1)(B).

This NSPS authority might provide EPA more flexibility than the NAAQS program. For example, in setting NSPS, EPA can distinguish among different types of sources in setting standards. Also, unlike NAAQS, EPA can take into consideration cost, non-air impacts, and energy requirements in NSPS standards. *Id.* § 7411(a)(1). In implementation, EPA cannot require the use of a particular technology, but the Act does provide the flexibility to express the standards as design, equipment, operational or work practice requirements. *Id.* § 7411(h).

In promulgating programs like the Clean Air Interstate Rule and the Clean Air Mercury Rule, the EPA has interpreted the phrase "standards of performance" to include market solutions like cap-and-trade programs.[3] However, the use of cap-and-trade programs under Section 111 is recent, and new Section 111 rules have been challenged by some states. Most recently, the Clean Air Mercury Rule, one of the first cap-and-trade programs under this provision, was overturned in February 2008 by the D.C. Circuit –

[3] Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,616 (May 18, 2005) ("The term 'standard of performance' is not explicitly defined to include or exclude an emissions cap and allowance trading program. In the final rule, EPA interprets the term 'standard of performance,' as applied to existing sources, to include a cap-and-trade program.").

albeit for reasons independent of the use of cap-and-trade under Section 111.[4] The Clean Air Interstate Rule also is the subject of a judicial challenge by some states.

Just as these creative solutions by EPA under Section 111 have invited litigation, we can expect that similar expansive uses of existing authorities to address greenhouse gases would generate lawsuits. Prolonged litigation is time consuming for agency staff, delays protection of the environment, and creates uncertainty for the regulated community.

Mobile Source Regulation

Motor vehicles, motor vehicle engines, and fuels are regulated under Title II of the Clean Air Act. Section 202(a)(1) of the Act requires the Administrator to prescribe "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which, in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7521. Under Section 202(a)(2), the Administrator must consider cost and technological feasibility in setting standards. *Id.* § 752(a)(2).[5]

As a matter of basic physics, the only practical means for reducing greenhouse gases emissions from gasoline-powered motor vehicles is to improve their fuel economy. Thus, regulation of greenhouse gas emissions under the Clean Air Act will inevitably

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[4] *State of New Jersey v. Envtl. Prot. Agency*, 05-1097 (D.C. Cir. Feb. 8, 2008) (vacating Clean Air Mercury Rule).

[5] Section 202(a)(2) reads: "Any regulation prescribed under paragraph (1) of this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period."

intersect with fuel economy regulation under other federal statutes such as the Energy Policy and Conversation Act and the Energy Independence and Security Act. While the Supreme Court's decision in *Massachusetts v. EPA* clearly contemplated overlap between regulation of fuel economy and mobile source greenhouse gas emissions, an important aspect of that decision also recognized that regulation in this area can, and should be, the product of a coordinated inter-agency effort. Specifically, *Massachusetts v. EPA* envisioned a coordinated inter-agency approach to addressing the manner in which the federal government should enact motor vehicle emissions standards to address climate change. So, the use of existing Clean Air Act authorities to address mobile source greenhouse gas emissions must necessarily ensure that effect is given to the goals and purposes of each of the congressional enactments that are implicated.

Conclusion

Finally, it is worthy of note that a chain of events may be well underway that would soon compel broad-based use of these existing Clean Air Act authorities to regulate greenhouse gas emissions. As noted above, each of the authorities discussed—NAAQS, NSR, NSPS, and Title II mobile source regulation—are triggered by an "endangerment finding." Once that finding is made, the EPA Administrator's discretion to avoid regulating is often very limited or non-existent. Moreover, an endangerment finding concerning greenhouse gases in one context—regardless of whether it is made for mobile source emissions or for stationary source emissions—would have wide implications. For example, if EPA were to make an endangerment finding with respect to mobile sources, the Government believes that finding would also constitute an

endangerment finding for stationary sources.[6] As recently as last week, the litigants in *Massachusetts v. EPA* filed papers to seek to enforce the Supreme Court's mandate and to compel EPA to issue a formal "endangerment" determination about carbon dioxide's public health effects within 60 days. Such a finding could have a cascade effect covering both mobile and stationary sources and triggering a non-discretionary duty on the EPA Administrator's part to regulate utilizing the current Clean Air Act. As noted earlier, however, the existing Clean Air Act authorities were not designed for and are not well-suited to addressing global pollution problems such as climate change.

Thank you for the opportunity to provide this testimony.

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[6] *See* Brief for the Federal Respondent at 32, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).